

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

Mr. Kramer
14757
PLM II

Request for Inclusion of Overtime Pay in Backpay]

FILE: B-198485

DATE: August 27, 1980

MATTER OF: William R. Simoneau

DIGEST: Employee was reinstated to his position after a determination was made that his removal was an unwarranted or unjustified personnel action. The agency has determined that payment for overtime should not be included in backpay because, for reasons other than his removal, the employee would not have worked overtime. Based on the facts presented this Office cannot say that determination is incorrect. Payment for overtime may not be made.

The issue is whether an employee, who was restored to his position after a determination that his removal was unjustified or unwarranted, is entitled to receive overtime pay as part of his backpay recovery when the agency has determined that overtime should not be paid because for reasons other than the erroneous removal the employee would not have been paid overtime during that period. For the following reasons the employee is not entitled to receive overtime pay for the period of his removal.

The question was presented for an advance decision by letter of March 27, 1980, from Mr. Philip P. Russo, Acting Director, Personnel Division, Internal Revenue Service.

On May 5, 1978, Mr. William R. Simoneau was removed from his position with the Internal Revenue Service. Mr. Simoneau appealed this action to the Office of Personnel Management which ordered the action cancelled by letter of February 7, 1979. Mr. Simoneau was restored to duty on March 5, 1979.

There is no doubt that Mr. Simoneau is entitled to backpay for the period of his removal, May 5, 1978 - March 5, 1979. See 5 U.S.C. 5596 (1976) and 5 C.F.R. 550.801 et seq. (1979). The agency does not question this but questions whether Mr. Simoneau is entitled to overtime pay for the period of his removal.

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Under the provisions of the Back Pay Act, 5 U.S.C. 5596(b)(1)(A)(1), an employee, who is entitled to backpay as a result of an unjustified or unwarranted personnel action, is entitled to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay that he normally would have earned for that period had the personnel action not occurred. In this regard, we have determined that the term "pay" includes overtime pay and have held that where an employee has been deprived of overtime work due to an unwarranted or unjustified personnel action, he is entitled to overtime pay under the Back Pay Act and implementing regulations even though he did not actually perform work during the overtime period. See Warren H. Kummer, B-194777, October 30, 1979.

The issue, therefore, is whether Mr. Simoneau would have performed overtime work during the period of his wrongful removal. Mr. Simoneau contends that he would have performed overtime work and relies on the fact that between the time his supervisor was made aware of the findings of his conduct investigation and his removal he was authorized and incurred 6 hours of overtime and that since his return to duty he has worked overtime. Moreover, he has submitted his prior history of overtime hours worked during the prior 3 years for the same 10-month period of his removal. On that basis he claims payment for 100 hours of overtime pay for the period of his removal, which is slightly less than the average number of overtime hours he says he worked for the similar period in the 3 previous years.

The Internal Revenue Service, on the other hand, contends that Mr. Simoneau should not be entitled to overtime pay as part of his backpay. Their determination was based on discussions with his supervisor which indicated that, as a result of the action taken by Mr. Simoneau, he received a written reprimand and that had he not been removed, scrutiny and intense review would have been exercised in an effort to minimize to the smallest extent possible the use of discretionary judgment in performing work during irregular hours.

As previously stated, 5 U.S.C. 5596 authorizes an employee who has undergone an unwarranted or unjustified personnel action to receive an amount equal to all or any part of the pay he

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"normally" would have received. See also, Federal Personnel Manual Supplement 990-2, Book 550, subchapter 8, and Internal Revenue Service Manual, section 0550.56. However, there is no specific formula which is for application in all situations involving overtime pay. We have held that the term "normally" suggests at least an administrative finding in each case that the facts support a reasonable probability that an employee would have performed duty for which compensation is payable. B-177315, December 12, 1972, and B-163142, February 28, 1968.

In this case the administrative determination was made that no overtime should be included in the backpay. Based on the facts presented, we cannot say that finding was incorrect and that the agency clearly should have reached a different conclusion.

Accordingly, Mr. Simoneau's claim for overtime should not be paid.

Harry R. Van Cleave
For The Comptroller General
of the United States